Supreme Court, U.S.
FILED

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(1)

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VERNON SMITH PETITIONER (PRO SE),

v.

MCBRAYER, MCGINNIS, LESLIE
& KIRKLAND LAW FIRM and
individually,
TERRY MCBRAYER,
JOHN R. MCGINNIS,
PHILLIP BRUCE LESLIE,
WILLIAM D. KIRKLAND,
AND GEORGE GREGORY. RESPONDENTS

On Petition for Writ of Certiorari to the Court of Appeal of Kentucky.

PETITION FOR WRIT OF CERTIORARI

Vernon Smith (PRO SE)
1021 Cross Keys Road, Apt. 13
Lexington, Kentucky 40504

28 pp

Questions Presented For Review

1. Whether petitioner's Constitutional rights under the Fourteenth Amendment, which includes procedural due process and equal protection of the law, were violated when State Circuit Court denied him permission to enter before the court, evidence, a month before the case was dismissed, when Kentucky Civil Rule 12.02 states, "...all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion"?

2. Whether petitioner was denied procedural due process and/or equal protection of the law, when State Court prevented him from having discovery and a trial, and ruled as fact respondent's statements without any evidence to back it and when the evidence clearly showed different?

3. Whether petitioner was denied procedural due process and/or equal protection of the law, when Lower Courts ruled there was no Legal Malpractice after the lawyer waited over 2 years to file a proof of claim in Bankruptcy Court, and other wrongs?

4. Whether petitioner was denied procedural due process and/or equal protection of the law, when Lower Court would not let petitioner amend his Complaint when Rule CR 15.01 AMENDMENTS ...LEAVE TO AMEND SHALL BE FREELY GIVEN WHEN JUSTICE REQUIRES.?

5. Whether petitioner was denied procedural due process and/or equal protection of the law, when State Courts ruled different in his case on Statute of Limitations for legal malpractice, than what the law plainly says and what its past rulings were?

6. Whether petitioner was denied procedural due process and/or equal protection of the law, when State Court prematurely dismissed this case?

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PETITION FOR WRIT OF CERTIORARI

Vernon Smith respectfully petition for a writ of certiorari to review the decisions of the Court of Appeals of the State of Kentucky, review of which was denied by the Supreme Court of the State of Kentucky, affirming the judgment against petitioners by the Franklin County Circuit Court.

OPINIONS BELOW

This case is not reported, and is contained in appendices pages 1 - 3.

JURISDICTION

The Kentucky Supreme Court denied petitioner's Motion for Discretionary Review by Order entered on October 22, 1997.

This petition was sent by U.S. mail within 90 days after entry of this order, with it being sent back by U.S. Supreme Court Clerk giving petitioner 60 more days to correct his petition, it is being filed before March 23, 1998.

This Court has jurisdiction to review the decision of the Kentucky Court of Appeal's decision by writ of centiorari pursuant to 28 U.S.C. Section 1257 (a), also pursuant to Rules of Supreme Court, Rule 10, (c) a State Court has decided an important federal question in a way that conflicts relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the interpretation of the following constitutional provisions and statutes.

1. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "...nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Kentucky Rules of Civil Procedure Section 12.02 "... motion to dismiss by...(g) failure to state a claim upon which relief can be granted ... shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion.

3. Kentucky Rules of Civil Procedure Section 15.01 Amendments. "... a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires..."

4. Kentucky Rules of Civil Procedure Section 59.01 Grounds for new trial. A new trial may be granted to all or any of the following causes: (f) That the verdict is not sustained by sufficient evidence or the instructions of the court. (g) Errors of the law occuring at the trial and objected to by the party under the provisions of these rules.

5. KRS 413.245 Legal Malpractice,
[A] civil action, whether brought in tort or contract, arising out of any act or omission in rendering or failing to render, professional services for others shall be brought within one year from the date of the occurrence or from the date when the cause of action was or reasonably should have been discovered by the party injured.

STATEMENT OF THE CASE

This is a Legal Malpractice case against McBrayer (respondent), who represented Vernon Smith (petitioner), against South East Coal Company (SECO), after it removed approximately 80,000 tons of coal from petitioner's property (mineral rights are owned by Vernon Smith and his sisters, (Smith Heirs),) without a lease. Anyone could go a short distance underground and see where the coal had been removed by SECO, yet respondent took no action for this willful trespass after 3 years. By Kentucky Law SECO was the one with burden of proof to show it was an accident, which it was not.

SECO moved the Smith property lines 200 yards to a position with minimum coal showing on it's mining maps, after surveying 2 times and knowing the true location of well established property lines that came out of a 1947 Court Order, (Action Number 5823).

SECO owners then intentionally deceived the other Smith Heirs, not Vernon Smith, into signing a one sided coal lease by showing the Smith Heirs these bogus mining maps with property lines in the wrong position and telling them SECO was up against their property and if they did not sign the lease now at less than 1/2 market price, the coal would be forever left underground, the bogus mining maps showed the Smith coal as being very small, thus they had no bargaining power.

SECO then labeled a large area of the Smith property as having already being mined out when in fact SECO got this coal, a list of SECO workers also said SECO got this coal. So SECO paid 1/2 market price for coal and for 1/2 total tons mined, ~80,000 tons was removed by willful trespass and ~60,000 tons was removed by fraud. Also no wheelage was paid to petitioner for adjacent Land Company Coal being hauled across his land.

For all this fraud, it took respondent 3 years to file a Complaint in Bankruptcy Court and then only because petitioner wrote demanding they do something. After 3 years, many on the Master Service List were paid 100% owed. After 3 years all the

Bankruptcy money was gone. After petitioner paid $8,000 to respondent, after respondent told petitioner not to cash a $1700 check, which is now uncashable, after it was too late respondent filed a proof of claim from which nothing was paid.

Bankruptcy Judge dismissed this Complaint, with respondent telling petitioner, the Judge could have dismissed the case completely and that there could be nothing more we could do but that the Judge had done us a favor and was letting us return to Letcher Circuit Court. Also respondent said to get the police to investigate SECO owners for criminal charges. Respondent sidetracked and mislead petitioner then stopped representing him in violation of SCR 3.130 Professional Conduct (Diligence).

On advise of respondent, petitioner searched for an attorney to represent him in State Court, with all refusing.

On or about July 1993, petitioner took his papers to the State Police Special Investigation Division in Lexington, Ky. Kentucky State Police Attorney Jim Daily, said they would get, the SECO owners, and that the petitioner needed to get the Smith property resurveyed. After spending another $8000 to get our property resurveyed, with the new survey showing property lines where we knew them to be, 200 yards from where SECO had them labeled on their maps.

Within days of sending Jim Daily a copy of the survey he was transferred to Frankfort Division (said another State Policeman), and that the case would be assigned to another State Police Investigator. A list of SECO workers who said SECO removed this coal was given to Daily and workers said the police never did ask them anything, State Police kept the Smith files close to a year.

After being patient the petitioner contacted the FBI Office in Pikeville, Special Agent Scott Barker told us, we needed to hurry and get a Civil Lawyer to protect the Smith Heirs interest. Petitioner searched for an attorney, and found Pete Cline in Middlesboro, Ky. Cline said as he looked over petitioner's papers, your lawyer should have gotten money out of this case and then a

little later said, your lawyer must' have messed up somewhere the record shows a letter he wrote. This letter recommended petitioner to take his entire file to Jim Gardner a Bankruptcy lawyer in Lexington. Jim Gardner read the complaint and said, he has fraud written here but there was no demand for damages and that it was odd that the case was in Bankruptcy Court, yet respondent had not filed for Bankruptcy Fraud, also no action was taken for personal case of fraud against SECO owners. This was a shock for the petitioner. Petitioner only then learned of malpractice, he took his lawyer at his word and had done everything respondent advised him to do.

On June 2, 1995 Petitioner (Plaintiff), filed his Complaint against respondent in Franklin Circuit Court with the clerk trying to convince him to file in District Court, and talked very rude and appeared to be upset.

Respondent then files for extension of time to plead. Circuit Judge grants this.

Respondent then files for motion to dismiss under CR 12, failure to state claim upon which relief can be granted.

Petitioner then files response to motion to dismiss.

On July 25, 1995 a hearing is held before the Judge, respondent in his opening remark states, "it is pure and simple SECO stole these people's coal but because they filed Bankruptcy there was nothing he could do". Petitioner then said Bankruptcy is not protection in cases of fraud and willful trespass and that SECO owners were the ones who did the fraud and willful trespass, and that they had enough money to buy SECO back from bankruptcy for $5,000,000, and that SECO stole other people's coal and no one could get anything done about it.

Petitioner began to show the Judge that the SECO property line mistake was not accidental, for it had to have been calculated for it to come out as it did, the Judge said, "you don't have to do that, respondent has already said SECO stole your coal," so in essence the court prevented petitioner from entering evidence that SECO actions were intentional, proof respondents also had and did nothing with it.

On September 13, 1995 petitioner filed in court, copies of correspondence called for in Complaint (page 3), which included letters between respondents, petitioner and SECO, showing respondents knew of wrongs SECO had done, and showing a settlement meeting between SECO lawyers and respondent, an apology from one of respondent's lawyers for not having a complaint filed by now, and also showing a 14 month time lapse, after this meeting where the respondent could not be reached. The Clerk didn't want to file it, but I insisted I had a right to file and then she did file.

On or about September 28, 1995 petitioner returned to Franklin Circuit Court Clerks office to look at all the record, to be sure everything was there, petitioner found his last papers filed but the rest was not there, he then asked the Clerk about it and learned it was in the Judges office. The Judge's aid, Maria Buckles seemed so nice and friendly and took me to her desk to find the rest of the papers, she asked, "do you have a lawyer helping"? I said no. She then said, the Judge may not be allowed by law to let petitioner enter his last papers filed, but that she would talk to the Judge about it and would call back and leave a message of what he said. The Judge's aid calls back saying, only if the Defendant agreed to let this come before the court can the Judge allow it, she also sent a letter to this effect. Petitioner read law book and could not find this law but was under the assumption Judges had to obey the law.

Needless to say, respondent refuses to agree to let these papers become part of the record.

Petitioner then sends these last papers into the court by amending his complaint to include them and to also to add another claim of fraud against Respondent that SECO had done to Petitioner.

On October 23, 1995 Judge Overrules Motion to Amend Complaint and Dismisses the entire case.

On November 1, 1995, petitioner files a CR 52 and CR 59 Motion for the court to state findings of court and to Alter, Amend or Vacate its order, Judge overrules this too.

Upon viewing the July 25, 1995 tape of hearing before the Judge, one statement made by the Judge, was removed from the tape and it was not in the beginning, end or when changing tape.

On December 11, 1995, petitioner filed Prehearing Statement in Court of Appeals of Kentucky stating Circuit Court erred in dismissing claim, and erred in refusing to allow Appellant to amend his Complaint, and court erred in ruling Appellant failed to prove malpractice.

Appeals Court rules Prehearing is not needed.

On March 1, 1996 petitioner files his Brief in Appeals Court, stating (page 5), "Lower Court's finding was premature and violative of Appellants right to procedural due process".

Kentucky Appeals Court affirms Lower Court Rulings and does not address the procedural due process issue.

Petitioner files for Discretionary Review with Kentucky Supreme Court, pointing out the violation of Procedural due process issue.

On October 22, 1997, Kentucky Supreme Court denies Motion and also does not address issue of procedural due process.

REASONS FOR GRANTING THE WRIT

1. Petitioner's rights were violated when Lower Court did not allow him to present before the court the evidence that SECO's mistake on property lines were purposely done also this Court does not let Petitioner enter copies of letters, convincing evidence of malpractice, a month before the case was dismissed.

2. Petitioner was denied Discovery and a Trial when Lower Court ruled for a dismissal under CR 12, without a chance to add evidence.

When considering a motion to dismiss under this rule, CR 12., the pleading should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true.
Gall v. Scroggy, 725 S.W.2d 867 (Ky. Ct. App. 1987)

Even if the statement of facts in the defendant's memorandum was entitled to be considered some of the facts in the statement controverted fact allegations of the complaint so as to establish, rather than negative, the existence of facts.
Spillman v. Beauchamp, 362 S.W.2d 33, 2 A.L.R.3d 814 (Ky. Ct. App. 1962)

Respondent says he did all he could do in this case and that there was no malpractice, then he turns around and says petitioner received a letter from him that says he did a malpractice and thus this case is time barred. The letter he is talking about has the wrong address on it and was not received by petitioner, but this is irrelevant, the letter does not say he did a malpractice to petitioner. This is to be explained more in question number 4 below.

Respondent also said all unsecured creditors in the SECO bankruptcy were paid nothing, this is not true, the other Smith Heirs filed proofs of claims in the beginning of the bankruptcy and were paid 100%, but then they didn't wait over 2 more years to file them as respondent did petitioner's.

Both Lower Court and Appeals Court, took these statements by respondent as fact while petitioner tried to tell them different, he has proof to show others were paid fully.

3. Petitioner was denied his rights when Lower Court ruled there was no malpractice, after all the lawyer did in not getting monies owed from SECO. SECO did not have a lease to remove petitioner's coal, because Vernon Smith did not sign coal lease, since when can a partner in a partnership sell someone else's part, all owners would have to sign to be within the law. Respondent also failed to subpoena SECO field notes from its 2 surveys of the Smith property. This issue was for a jury to decide, not a biased Judge.

The petitioner was paid nothing when, other proof of claims filed in the beginning of Bankruptcy were paid 100%, charged plaintiff $8000 and told plaintiff his claim had been returned to Circuit Court, when it had not, and for the plaintiff not to cash a $1700 South East Coal Company (SECO) check that is now uncashable, and failed to file a claim for clear and

provable fraud and willful trespass, when this lawyer had written intentional fraud on several of his papers?

4. Petitioner's rights were violated when Lower Court ruled different on petitioner's case than what the law says and what its past rulings were.

KRS 413.245 Statute of Limitations for Legal Malpractice
[A] civil action whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been discovered by the party injured.

In Michels v. Sklavos 869 S.W.2d 728 (1994), the Kentucky Supreme Court explained, "...we can not charge a Layman with knowledge that legal malpractice has occurred when trained counsel [his attorney] insists that the fault lay with the trial court, and that the result may well be reversed...".

KRS 413.245 Has been determined to have 2 statute of limitations by the Ky. Sup. Ct. Michels v. Sklavoes, the first limits the claim to "1 year from the date of occurrence" which is the time when the cause of action accrues, the damages are speculative until that underlying action is finally resolved. The second limitation limits the claim to "1 year" ... from the date when the cause of action was or reasonably should have been discovered by the injured party, if that date is later in time." page 731, thus, the discovery period kicks in only if the causes of action has accrued but the client does not and reasonably should not know this. Put more simply, the discovery rule is irrelevant until the negligence becomes and nonspeculative damages have occurred. When those 2 things do occur, the discovery rule kicks in to toll the statue of

limitations until such time as the client knows or reasonably should know he has been injured.

SECO trespassed and frauded the Smiths in November 1989, and the time limit for these charges is 5 years, then add the one year limitation on lawyer malpractice and the bar date would have been after November 1995, the malpractice claim was filed June 2, 1995 so the case was not time barred at all.

Respondent said that the closing letter he sent, with the wrong address on it, that petitioner did not get, stated that petitioner was wronged by SECO and thus is time barred. Petitioner knew he was wronged by SECO back in 1989, I hardly think this, known to be wronged, is the one that runs the statute of limitations; the law is clear, 1 year from when client knew he has been wronged by his lawyer and I have read this letter several times and it is not there, *"I wronged you"*. Appendice page 8.

If petitioner had been a lawyer, then he would have known of malpractice much sooner, but then if petitioner had been a lawyer, respondent would never have been hired to work on the case. So like it or not, we layman are forced to rely on their lawyers for legal advise, we must take them at their word. Thus there is no way this case is time barred in keeping with the law.

5. Petitioner's rights were violated when Lower Court ruled he could not Amendment his Complaint to include copies of evidence and another claim of fraud that SECO did to petitioner that respondent failed to take action on.

Original complaint (page 3) states;

12) Plaintiff's claim is by reason of:

a) willful trespass, (mining ~80,000 tons of plaintiff's coal without a lease, after surveying twice and knowing the true location of well established property lines that came out of a 1947 Court Order, (Action Number 5823).

b) for fraud, with condition of mind to intentionally deceive and causing the Smith Heirs to act from the misrepresentation (showing bogus maps with property lines skewed 500 feet to a position with minimum coal, as resented by Exhibit #2) and getting them to enter into agreement an unfavorable coal lease, selling coal for 1/2 market value with no wheelage being paid to plaintiff for adjacent mineral owners coal being hauled across plaintiff, Vernon Smith's property,

To amend to include:

c) "for fraud, with the condition of mind to intentionally deceive the Smith's and prevent SECO from having to pay royalties for total tons mined, by purposely mislabeling mining maps by showing a large area as having already been mined out when in fact SECO mined this coal."

It seems impossible, but somehow Lower Court found this part (c) to be action against SECO and so was separate and apart from the rest of the complaint. A malpractice suit is a lawsuit within a lawsuit, and one must state the original case and show that it could have been won before the malpractice

case can be won, petitioner was required to state the first claim. It was too late to file a claim against SECO, respondent made sure of that. If the action was against SECO, SECO would have been named as a defendant, it is ludicrous to contend this amended sentence does not fit, the original complaint parts (a) and (b) which were not objected to.

CONCLUSION

State Court rulings were erroneous, biased, unfair and most likely political. This suit is against one of the most powerful people in Kentucky government, Terry McBrayer, past chairman of the Democratic Party, a high priced lobbyist, one of the few unelected Kentuckians with access to top White House Officials, campaign fund raiser for the Democratic Party and political races across the state, and has done over $1 million legal contract work for the state of Kentucky. Past Kentucky Supreme Court Judge(fill-in). Kentucky has had just one Republican governor since World War II, so it is a one party state.

SECO has stolen other people's coal, and nothing could be done about it, respondent states in July 25, 1995 hearing, SECO stole the Smith's coal, it is impossible to believe there was nothing he could do when about $400,000 royality from this coal was taken.

SECO owners owned the mining equipment and leased it back to the company, court records show for $51,000/month, then SECO owners turn around and buy the company back for $5,000,000, so this was not a case where petitioner was trying to kick a dead horse, these people had lots of money. If a poor person steals, he goes to jail, some for life.

How can government expect it's people to fight aggression in war, and stand by and let atrocities as this, go unchecked in it's own country. It is so odd that Eastern Kentucky filled

with so much wealth with coal and oil, could be home of so much poverty. In talking with the people, others have had their land and coal taken away from them by using the state court system, the very system that is supposed to protect them.

There must be provisions in the system to handle cases, as this one, where people who have so much influence in State Government, that they are immune from liability in State Court.

For all of the reasons stated above, petitioner, Vernon Smith respectfully ask that this court grant his petition for writ of centiorari.

App. A. **COMMONWEALTH OF KENTUCKY**
COURT OF APPEALS
NO. 95-CA-3196-MR

Vernon Smith — Appellant

v. APPEAL FROM FRANKLIN
CIRCUIT COURT NO. 95-CI-0776

McBrayer, McGinnis, Leslie & Kirkland — Appellees

OPINION AFFIRMING

BEFORE; BUCKINGHAM, COMBS, and KNOPF, Judges. Knopf, Judge: Vernon Smith appeals the trial court's order dismissing his legal malpractice lawsuit against McBrayer, McGinnis, Leslie & Kirkland, et al. (MMLK), a law firm which represented Smith against South East Coal Company (SECO). The trial court granted MMLK's motion to dismiss on two grounds: 1) the court could not find any omission or failure of MMLK to render professional services; and 2) the lawsuit was barred by the one-year statute of limitations.

McBrayer, McGinns Leslie and Kirkland undertook to represent Vernon Smith and the other heirs of Grant Smith against SECO. SECO mined coal on and underneath the Smith property for which SECO owned royalties and wheelage monies to the Smith heirs.

When MMLK began investigating the location of the Smith property boundaries and the correct royalties and wheelage owned for the mining of that property SECO filed for bankruptcy. Consequently, MMLK filed a complaint in the bankruptcy court claiming that SECO intentionally misrepresented the boundary lines of the Grant Smith heirs'

property and that SECO defrauded the Smith heirs out of royalties and wheelage owed to them by SECO. In response SECO filed a motion to dismiss the complaint arguing what the matter regarding royalties and wheelage could be handled in accordance with the proof of claims process in the bankruptcy proceedings. On January 12, 1992, the bankruptcy court agreed with SECO and dismissed without prejudice the adversary proceeding.

To protect the Smith heirs' claims, proof of claims had to be filed with the bankruptcy court. MMLK had tended a proof of claim for Vernon Smith on April 30, 1991, and filed an amended proof of claim on January 5, 1993, claiming damages in excess of $400,000. Vernon Smith's claim was unsecured. Consequently, as with all the other unsecured creditors of SECO, Vernon Smith was not paid his damages.

On January 19, 1993 MMLK wrote a letter to the Smiths explaining the action taken by the bankruptcy court, advising the Smiths to talk to an attorney about protecting their future interests, and suggesting they pick up their file or have their file mailed. The Smiths obtained their file in February 1993. Vernon Smith filed this lawsuit on June 2, 1995.

It appears from Vernon Smith's appellate briefs that he does not understand the nature and the consequences of the bankruptcy proceedings that occurred in this case. Although his misapprehension may be justifiable it does not create a malpractice
action and it does not toll the statute of limitations. In this case, the bankruptcy court dismissed the adversary proceeding and only allowed the Smiths to file an unsecured proof of claim which MMLK did file on Vernon Smith's

behalf. MMLK then terminated its representation of the Smiths. After these events, any legal harm that may have arisen from MMLK's representation of Vernon Smith had become fixed, non-speculative, and reliance on MMLK's legal representation had ended. See, Michels v. Sklavos, Ky., 882 S.W.2d 728 (1994), and Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121 (1994). Thus, February 1993, after a termination letter had been sent and the clients had received their file, constitutes the latest possible date for the statute of limitations to begin to run. Thus, the trial court correctly concluded that this action is time barred.

Vernon Smith also complains that the trial court erroneously denied his motion to amend his complaint against MMLK to add SECO as a defendant. The trial court denied this motion upon finding that the new claim was "separate and apart from this action and does not relate to the claims made in this case."

Civil Rule 15.01 allows amendment to pleadings under these circumstances "only by leave of court or by written consent of the adverse party." The trial court has great discretion with regard to these kinds of motions to amend. First National Bank v. Hartmann, Ky. App. 747 S.W.2d 614 (1988). Vernon Smith has not shown how the trial court abused its discretion in denying this motion. Not only are Vernon Smith's claims against SECO separate from his claims against MMLK, but his claims against SECO are barred by the bankruptcy. The trial court properly denied the motion.

For these reasons the Franklin Circuit Court is affirmed.

ALL CONCUR.

SUPREME COURT OF KENTUCKY
NO. 97- SC- 260
(95-CA-3196)

VERNON SMITH — MOVANT

VS. FRANKLIN CIRCUIT COURT
NO. 95-CI-776

McBRAYER, McGINNIS, LESLIE & KIRKLAND, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Lambert, J., not sitting.

ENTERED October 22, 1997

/s/ ROBERT STEPHENS
ROBERT STEPHENS
Chief Justice Kentucky
Supreme Court

App. C

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 95-CI-00776
DIVISION I

Vernon Smith — **PLAINTIFF (PRO SE)**

VS. **ORDER**

McBRAYER, McGINNIS, LESLIE & KIRKLAND, ET AL — **DEFENDENTS**

This matter is before this Court upon a Motion of the Defendants to Dismiss and Motion of the Plaintiff to amend his complaint.

This Court has considered the pleadings, conducted a hearing, and is fully advised.

The Motion to Amend by the Plaintiff is OVERRULED. The Plaintiff has indicated that he wishes to amend his complaint to charge fraud against the party, South East Coal Company, which precipitated the representation by the Defendants. That is an action, if allowed to be brought, which is separate and apart from this action and does not relate to the claims made in this case.

The Motion of the Defendants to Dismiss is GRANTED. The Court, in reviewing the pleadings in a light most favorable to the Plaintiff, cannot determine that there was an omission or failure to render professional services on behalf of the Plaintiff, since the Defendants did file a Proof of Claim with the Bankruptcy Court and it appears that suit was filed within one month of the letter from Michael Smith authorizing such suit.

In any event, the Plaintiff was put on notice by the Defendants on January 19, 1993, that the action had been dismissed. At that point in time, the Plaintiff had one (1) year to proceed against the Defendants for failing or omitting to render professional services. KRS 413.245. In this instance, even if the Defendants were negligent in rendering professional services to the Plaintiff that fact should have reasonably been discovered by the Plaintiff upon receipt of the January 19, 1993, letter. Since this action was not filed until June 2, 1995, it is time barred.

It is therefore the JUDGMENT of this Court that the Plaintiff's Motion to Amend is OVERRULED and the Defendants' Motion to Dismiss is GRANTED and this action is, by this Order, hereby DISMISSED.

There being no just cause for delay, this is a final and appealable order.

SO ORDERED this 23 rd day of October, 1995

/s/ ROGER L. CRITTENDEN
ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 95-CI-00776
DIVISION I

VERNON SMITH **PLAINTIFF**
(PRO SE)

VS. **ORDER**

McBRAYER, McGINNIS, LESLIE & KIRKLAND, ET AL. **DEFENDANTS**

This matter is before this Court upon a Motion by the Plaintiff to require separate Findings of Facts supporting this Court's Order of October 23, 1995, and to Alter, Amend or Vacate the Court's Order of October 23, 1995. This Court has considered the Motion and the oral response of the Defendants and is fully advised.

It is the Order of this Court that the Plaintiff's Motion for additional Findings of fact and to Alter Amend or Vacate the Court's Order of October 23, 1995, is OVERRULED.

There being no just cause ~~for~~ delay this is a final and appealable order.

SO ORDERED this 9 th day of November, 1995

/s/ ROGER L. CRITTENDEN
ROGER L. CRITTENDEN
JUDGE, FRANKLIN CIRCUIT COURT

App. E **McBrayer, McGinnis, Leslie & Kirkland**
(letterhead)
January 19, 1993

Mr. Michael Smith
c/o Berea College
P.O. Box 2347
Berea, Kentucky 40404

Mr. Terry Fields
282 Sutton Lane
Lancaster, Kentucky 40444

RE: Vernon Smith vs. SECO

Dear Michael & Terry:

Enclosed please find the following:

1. A copy of the Complaint we filed;
2. A copy of South East Coal Company's (SECO) Motion to Dismiss;
3. A copy of our Response to the Motion; and
4. The Court's Order dated January 12, 1993 dismissing the adversary proceeding without prejudice to assert any prepetition claims or administrative expense claims you might have against SECO.

I urge you to resolve the location of the property lines through a current updated survey in accordance with the 1947 judgment. I also encourage you to give SECO or its successor an opportunity to participate in the survey so as to put all questions as to their prior acts or future mining intentions to rest. This is particularly important if you want to protect your family's interest in the two upper seams yet to be mined and the Elkhorn seam.

With regard to an action to recover any royalties paid by SECO to Prospect for coal mined from beneath your land I can only offer my comments and the benefit of what I've learned over the past three years to an attorney closer to Letcher county.

You've been given Pete Gullett's name and he is very capable. If you wish, I can visit with him in person or by phone to give him the benefit of what I know. If he is not in a position to take the case I would ask him for suggestions.

I have the file here and can mail it to either of you after we make copies of certain pleadings. Alternatively, if one or the other of you is going to be in Lexington in the next couple of weeks, you can pick it up.

I wish that I, and our firm, could have done more for you because SECO clearly wronged the family members. Unfortunately, the Bankruptcy precluded us from collecting and funds that would have been exclusively attributable to you as opposed to going into a pool. Should you have any questions please give me a call.

Sincerely,

/s/ George Gregory
George Gregory

GG/pwr

Enclosures